



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 20, 1995

Mr. Everette D. Jobe
General Counsel
Texas Department of Banking
2601 North Lamar Boulevard
Austin, Texas 78705-4294

OR95-137

Dear Mr. Jobe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 29984.

The Texas Department of Banking (the "department") has received a request for information relating to United Fidelity & Trust Company dated October 12, 1994. Specifically, the requestor seeks "all records" relating to this company in the department's possession. You have submitted the requested information to us for review. You claim that sections 552.101, 552.103, 552.108, and 552.112 of the Government Code except the requested information from required public disclosure.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that information submitted as Exhibit B is made confidential by subsection (a) of article 342-210, V.T.C.S., of the Texas Banking Code, which provides in part that

all information obtained, either directly or indirectly, by the Banking Department relative to the financial condition of any bank or bank holding company other than call reports and profit and loss statements, whether obtained through examination or otherwise, except published statements, and all files and records of said Department relative thereto shall be confidential, and shall not be disclosed by the Banking Commissioner or any officer or employee of said Department.

Article 342-210 deems confidential only information that was obtained by the department and that is relative to the financial condition of a bank, unless it is within one of that provision's exceptions to confidentiality.¹ See also V.T.C.S. art. 342-1102, § 1, art. 342-1103, § 5 (providing that trust companies are subject to V.T.C.S. art. 342-210). Some of the information does not concern the financial condition of the trust company. We do not believe that any of the exceptions to confidentiality apply to the information submitted as Exhibit B. We conclude that only the marked portions of Exhibit B are confidential and must be withheld under section 552.101 of the Government Code pursuant to article 342-210 of the Banking Code. See *Stewart v. McCain*, 575 S.W.2d 509 (Tex. 1979).

You also claim that section 552.112 of the Government Code excepts Exhibit B from required public disclosure. Section 552.112(a) excepts "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." This section protects specific examination, operating, or condition reports obtained by agencies in regulating or supervising financial institutions or securities, or information that indirectly reveals the contents of such reports. Open Records Decision Nos. 261 (1980); 29 (1974). Such reports typically disclose the financial status and dealings of the institutions that file them. We conclude section 552.112(a) does not except the information in Exhibit B that is not made confidential by V.T.C.S. article 342-210.

Subsection (a) of article 342-210 of the Banking Code makes some of the records submitted in Exhibit A confidential. These records have been marked and must be withheld from required public disclosure under section 552.101 of the Government Code.

Next, we address your assertion that section 552.103 of the Government excepts the requested information from required public disclosure. For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ

¹Article 342-209 requires the Banking Commissioner to "call upon each state bank four times each year to make and publish a statement of its financial condition." Therefore, information that is part of the bank's financial statement published pursuant to article 342-209 is within the exception to confidentiality in article 342-210 for "call reports." The phrase "profit and loss statement" is not defined by article 342-210 or by any other provision of the Texas Banking Code. In prior rulings of this office, we have interpreted the phrase according to its commonly understood meaning. See Gov't Code §§ 311.01, 312.002. The phrase "profit and loss statement" is generally defined as a financial statement "showing the income, costs and expenses of a business over a specific period of time." See BLACK'S LAW DICTIONARY 763, 1211 (6th ed. 1990) (defining "income statement" and "profit and loss statement" similarly); WEBSTER'S THIRD NEW INT'L DICTIONARY 1143, 1811 (1969) (also defining "income statement" and "profit and loss statement" similarly). Article 342-211 makes it a criminal offense for the banking commissioner or any department employee to release information made confidential by article 342-210.

ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. For section 552.103 to apply, there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982).

You advise us that the requestor has been convicted of criminal conspiracy, false claims, and false statements, in an action brought by the federal government, and has been fined and sentenced to prison. Clearly, the department was not a party to this criminal action and cannot expect to be a party to an appeal of the requestor's conviction, should one arise. You argue, however, that section 552.103 applies in this instance because the department is "involved in the referenced lawsuit to the extent that [it has] furnished information and copies of documents to the United States Attorney's Office and the Federal Bureau of Investigation regarding their claim[s]" and because one of the department's assistant departmental examiners has been subpoenaed to testify. We disagree with your contention that section 552.103 applies in this instance. The fact that the department has cooperated with the federal government in its prosecution of a person subject to the department's regulatory authority does not make the department a party to litigation. You have not indicated that the department may itself bring an action against the requestor. We conclude, therefore, that litigation to which the department is a party is neither pending nor reasonably anticipated. Accordingly, the department may not withhold the requested information under section 552.103 of the Government Code.

Finally, we address your contention that section 552.108 of the Government Code excepts the requested information from required public disclosure.² Section 552.108 excepts:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.

When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of*

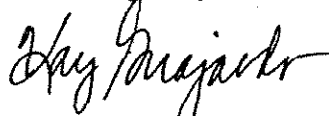
²We note that you raised section 552.108 after the ten-day limit set forth in section 552.301 of the Government Code expired. Ordinarily, a governmental body may not assert an additional exception to required public disclosure once the ten-day limit has expired. Open Records Decision No. 515 (1988). In this case, however, you raise section 552.108 to assert the law-enforcement interests of a third party. A third party's law enforcement interest is sufficiently compelling to override the presumption of openness that arises upon failure to timely assert an exception to required public disclosure. *See* Open Records Decision No. 586 (1991).

Houston, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2.

As noted above, the requestor was convicted in federal court for various offenses, including criminal conspiracy and false claims, fined, and sentenced. It would appear, then, that the requested information no longer relates to an on-going law enforcement investigation or criminal prosecution. Moreover, we have contacted the Federal Bureau of Investigation and ascertained that release of the requested information would not at this juncture interfere with its law-enforcement interests. You have not explained how release of the information might otherwise unduly interfere with law enforcement, nor do the submitted records provide such an explanation on their face. We conclude, therefore, that the department may not withhold the requested information under section 552.108 of the Government Code. Accordingly, except for the marked portions of exhibits A and B, the department must release the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Open Government Section

KHG/GCK/rho

Enclosures: Marked documents

Ref.: ID# 29984

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